June 12, 2000

MEMORANDUM TO: The Secretary
The Director of the Census

FROM: Andrew J. Pincus

SUBJECT: Legal Obligation to Produce Statistically-Corrected Non-Apportionment Census Numbers

As you know, the Department of Commerce and the Census Bureau have been reviewing what process to use in determining whether to statistically correct census data for purposes other than apportionment of the House of Representatives. As part of this review, we have examined the legal requirements of the Census Act. After careful analysis, we have concluded that Section 195 of the Census Act requires the Census Bureau, if feasible, to produce statistically-corrected numbers from the decennial census for all non-apportionment purposes.

The feasibility determination is a technical decision that should be made by the Director, to whom the Secretary delegated his Title 13 responsibilities in Departmental Organizational Order 35-2A (July 22, 1987). To this end, we also believe it appropriate to propose a regulation that would make certain that the Director has final authority over the feasibility determination.

I. Background

The Constitution requires Congress to apportion seats in the House of Representatives among the States every ten years based on the results of the decennial census, providing that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they [Congress]

shall by Law direct."[1] Through the Census Act, which is codified in title 13 of the United States Code, Congress has delegated its broad authority over the census to the Secretary of Commerce.[2] In particular, 13 U.S.C. § 141(a) provides that the Secretary of Commerce shall take "a decennial census of [the] population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys." As the Supreme Court recognized in Wisconsin v. City of New York, the Secretary's determination as to how to conduct the Census, pursuant to the delegation of authority provided to him by Congress, need only be reasonable, so long as it is also "consistent with the constitutional language and the constitutional goal of equal representation." Id. at 19. The Court further recognized, in the context of the Secretary's decision in 1990 not to adjust the census, that the "Constitution itself provides no real instruction" on what methods the Secretary should use in performing the Census. Id. at 18.

II. Section 195 of the Census Act Requires the Census Bureau to Use Sampling When "Feasible" For Calculating the Population For Purposes Other Than Apportionment of Seats in the House of Representatives Among the States

Section 195 of the Census Act states:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.

13 U.S.C. § 195. Section 195 refers specifically to only one of the many uses of census data. Decennial census data are used not only by the U.S. Congress for apportioning seats in the House

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[1] Constitution, Art. I, Sec. 2, Cl. 3.

[2] Wisconsin v. City of New York, 517 U.S. 1 (1996).

of Representatives among the States, but also by the States in drawing the lines for congressional and state and local legislative districts, and by federal and state agencies in allocating funds.

In Department of Commerce v. House of Representatives, 119 S. Ct. 765 (1999), the Supreme Court held that Section 195 does not permit the use of sampling to produce population counts for the purpose of apportioning seats in the House of Representatives among the States. Id. at 777 ("there is only one plausible reading of the amended §195: It prohibits the use of sampling in calculating the population for purposes of apportionment."). Here, the question is what standard Section 195 applies with respect to the calculation of population by the Census Bureau for purposes other than "apportionment of Representatives in Congress among the several States." The plain language of the provision supplies the answer: Section 195 states that the Secretary "shall" authorize the use of statistical sampling for all other purposes "if he considers it feasible." Thus, when calculating population or other information for a purpose other than apportionment, the Secretary (or his designee, the Census Bureau) must first determine whether it is "feasible" to use sampling, and – if the use of sampling is feasible – its use must be authorized.

This interpretation of Section 195's plain language is confirmed by Congress's amendment of the provision in 1976. Prior to that amendment, Section 195 stated:

> Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.

The pre-1976 wording ("may, where he deems it appropriate") gave the Secretary the option of using sampling. The 1976 amendment eliminated the Secretary's discretion, transforming Section 195 into a mandatory directive – the Secretary "shall . . . authorize the use of" sampling for all other purposes "if he considers it feasible." The Census Act therefore unambiguously requires,

with respect to non-apportionment calculations, that when sampling is feasible, it must be used.

The Supreme Court's recent decision in Department of Commerce v. House of Representatives confirms this conclusion. In explaining the purpose of the 1976 amendments, the Court stated, "[t]hey changed a provision that permitted the use of sampling for purposes other than apportionment into one that required that sampling be used for such purposes if 'feasible.'" 119 S.Ct. at 778. The Court explained that "section [195] now requires the Secretary to use statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census. But the section maintains its prohibition on the use of statistical sampling in calculating population for purposes of apportionment." 119 S.Ct. at 777.

III. The Census Bureau's Calculation of Population for the Purpose of Redistricting is Subject to Section 195's "Feasib[ility]" Standard

Section 141(c) of the Census Act permits the "officers or public bodies having initial responsibility for the legislative apportionment or districting of each State" to submit to the Secretary "a plan identifying the geographic areas for which specific tabulations of population are desired." The same provision directs the Secretary to report such "[t]abulations of population," as well as the "basic tabulations of population" for States that have not submitted a plan, within one year of the decennial census date. It is clear that these population tabulations are not "the determination of population for purposes of apportionment of Representatives in Congress among the several States" (Section 195), and therefore are subject to Section 195's directive that the use of sampling "shall" be authorized if "feasible."

To begin with, the population tabulations supplied to the States pursuant to Section 141(c) simply are not made or used for purposes of apportioning seats in the House of Representatives

among the States. Section 141(c) makes clear that it relates to tabulations for "legislative apportionment or districting of each State." And a separate subsection of Section 141 – subsection (b) – governs the "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States." Indeed, the distinction between these two groups of calculations is confirmed by their different due dates: the latter set of numbers must be completed three months earlier than the redistricting information required by Section 141(c). See also Section 141(e)(2) (distinguishing between use of census data for "apportionment of Representatives in Congress among the several States" and for "prescribing congressional districts").

Some commentators have suggested that the term "apportionment" within Section 195's "[e]xcept" clause encompasses population calculation for the purposes of redistricting as well as for the purpose of allocating seats in the House of Representatives among the States. That position is inconsistent with the plain language of the statute. First, it ignores the clear distinction in Section 141 between these two categories of calculations. Second, Congress in 1976 revised the "[e]xcept" clause, replacing the word "apportionment" with the phrase "apportionment of Representatives in Congress among the Several States." It is difficult to imagine how Congress could have more clearly evidenced its intent to limit Section 195's prohibition against the use of sampling to the calculation of population used to allocate among the States seats in the House of Representatives. And because Section 141(c) specifically refers to tabulations for redistricting purposes, but that reference does not appear in the "[e]xcept" clause of Section 195, it is plain that redistricting tabulations are not encompassed within the Section 195 prohibition.[3]

[3]Some commentators have argued that the Supreme Court reached a different conclusion in Department of Commerce because it found standing "on the basis of the expected effects of the use

Finally, some commentators have suggested that as a practical matter these two sets of numbers are inextricably linked, asserting – for example – that it would be a plainly improper result if the Section 141(c) population tabulation of a State for redistricting purposes did not equal the Section 141(b) apportionment population tabulation for that State. Nothing in the Census Act requires that result and, moreover, the two totals have not been equal in the past. For example, government personnel stationed overseas are included in a State's Section 141(b) tabulation, but are not included in the data provided to that State under Section 141(c). Congress could have required such equality in either Section 141 or Section 195, but it did not do so. Rather, Congress in Section 141 expressly distinguished between the two categories of calculations.

The Census Act thus clearly directs that statistical sampling "shall" be used in tabulating population for the purposes set forth in Section 141(c) if the Secretary considers it "feasible" to do so. Even if the plain language of the Act were not clear on this point, we believe that this interpretation is most consistent with the purposes of the Census Act and that adopting such an interpretation is within your discretion. In Wisconsin v. City of New York, 517 U.S. 1 (1996), the Supreme Court unanimously concluded "the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary," mandates substantial judicial deference to the

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of sampling in the 2000 census on intrastate redistricting" (119 S.Ct. at 774). The Court's standing decision, however, simply reflects a conclusion that an individual claiming injury by the use of that data for redistricting had alleged sufficient Article III injury in fact to challenge the plan. But the Census plan before the Court provided for the collection and production of a single set of sampling-adjusted data for use in both the apportionment tabulation and the redistricting tabulation. Because the Court invalidated the plan, there was no need for the Court to apply Section 195 to the use of sampling for redistricting purposes in order to redress these plaintiffs' purported injury. This conclusion is confirmed by the Court's careful limitation of its holding: "The District Court below . . . concluded that the proposed use of statistical sampling to determine population for purposes of apportioning congressional seats among the States violates the Act. We agree." 119 S. Ct. at 765 .

Secretary's determinations with respect to the decennial census (517 U.S. at 19). Given the long history of the use of sampling by the Census Bureau, and the importance of obtaining the most accurate population tabulations possible – because of the constitutional significance of the "one person, one vote" principle and of the equal protection principles reflected in the Voting Rights Act – interpreting the statute to permit the use of sampling when feasible is the most appropriate approach. The alternative interpretation would bar the use of statistical sampling even if the use of sampling would lead to more accurate results, a construction that conflicts with the basic goal of the decennial census – to obtain an accurate count of the persons within the United States.

IV. The Standard For the Feasibility Determination

Section 195 does not contain a definition of the term "feasible." The dictionary definition of the term ranges from the most common "capable of being done or carried out" to "capable of being used or dealt with successfully, suitable" or "reasonable, likely." Webster's Ninth New Collegiate Dictionary (1990). The Supreme Court has considered the word "feasible" in other contexts and found that the plain meaning of the term generally denotes the first and broadest definition — "capable of being done." In American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490, 509 (1981), the Court interpreted the term "to the extent feasible" to preclude the Secretary of Labor from engaging in a cost-benefit analysis of a public health standard; as the Court explained, Congress itself, by requiring a standard "to the extent feasible" had made the policy choice for the Secretary. See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411 (1971) ("the requirement that there be no 'feasible alternative' route admits of little administrative discretion.").

We understand the term "feasible" in accordance with its ordinary meaning and the overall purposes of the Census Act. It also must be understood in terms of the uses to which non-apportionment census data are put, including, among other things, redistricting and allocation of federal funds. While in other contexts it might be appropriate to understand “feasible” to mean “possible,” given the obvious importance of obtaining the most accurate population (and other) tabulations possible, it would seem most appropriate to construe that term in a manner that focuses upon promoting accurate census results.[4] Thus, with respect to the proposed use of statistical sampling for data to be released to the States under Section 141(c), such use is “feasible” within the meaning of Section 195 if (1) the proposed use of sampling is compatible with the other aspects of the census plan, and with any statutory, timing, and funding constraints; and (2) the proposed use of statistical sampling would improve the overall accuracy of the census data.

The two components of "feasibility " can be termed "operational feasibility" and "technical feasibility." These are matters that are properly within the expert judgment of the Census Bureau. The Census Bureau's extensive experience in the conduct of the census, the use of statistical sampling techniques, and the measurement of accuracy should be the basis for these essentially technical judgments.

V. The Decisionmaking Process

The determination whether the use of sampling is “feasible” under Section 195 should be

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[4]Of course, in other contexts where there is no independent requirement that the population count be conducted without the use of sampling (unlike the decennial census, where the statute as construed by the Supreme Court prohibits the use of sampling for apportionment of seats in the House of Representatives), the analysis might also take greater account of the efficiencies that could be gained by substituting sampling for those other methods.

based upon the information before the decisionmaker at the time the determination is made. Public Law No. 94-171 requires the Census Bureau to deliver official census data to the states for redistricting purposes by April 1, 2001. 13 U.S.C. § 141(c). As with every decennial census, the Census Bureau will conduct extensive analyses on the census data in the ensuing years. In order to make a final decision on whether to deliver statistically corrected data for redistricting purposes, the Census Bureau need only consider the evidence available to it at the time of its decision to determine whether the statistically corrected numbers are more accurate and therefore that the use of sampling is "feasible" as that term is defined herein. See, e.g., Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, 435 U.S. 519, 552-54 (1978) (review of agency decision must be made based on information available at the time the decision was made); ICC v. New Jersey, 322 U.S. 503, 514 (1970).

The Census Bureau is in the process of completing a document which will provide information concerning its assessment of whether using statistically sampling is feasible with respect to the release of P.L. 94-171 data. Although, as the document will indicate, the Census Bureau has determined that the use of statistical sampling is operationally feasible and should improve the accuracy of the census, no final decision will be made with respect to the release of data until after the Bureau has had the opportunity to review whether census operations were conducted in a way that met expectations. This document will be published in the Federal Register, along with a proposed regulation that would delegate to the Director of the Census the Secretary of Commerce's authority to make the final, technical decision on what numbers to release and would set forth a process for the Census Bureau's consideration of what numbers to release.

cc: Robert J. Shapiro, Under Secretary for Economic Affairs